No. 87-519

IN THE SUPREME COURT OF THE
UNITED STATES, OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF AMICI CURIAE*
ALABAMA, ARIZONA, COLORADO, IDAHO, LOUISIANA, MISSISSIPPI, MISSOURI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WYOMING

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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE

The amici curiae are states that have an interest in the issue of construction of the aggravating circumstance in a capital murder case that the murder was especially heinous, atrocious or cruel.[1]

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[1] Eight states employ the language that the offense was
(continued...)

The amici submit this brief through their Attorneys General pursuant to Sup.Ct.R. 36.4. This brief is presented in support of the

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[1](...continued)
"especially heinous, atrocious, or cruel." Ala. Code § 13A-5-49(8) (1978 & Supp. 1987); Fla. Stat. § 921.141(5)(h)(1983); La. Code Crim. Proc. Ann. art. 905.4(A)(7)(West 1987); Miss. Code Ann. § 99-19-101(5)(h)(Supp. 1987);1 N.H. Rev. Stat. Ann. § 630.5(II)(a)(7) (Supp. 1987); N.C. Gen. Stat. § 15A-2000(e)(9) (1981); Okla. Stat. Ann. tit. 21, § 701.12(4) (West Supp. 1987); Wyo. Stat. § 6-2-102(h)(vii)(1983). Sixteen other states may not employ the terminology "especially, heinous, atrocious or cruel", although the import of the circumstance is the same. See e.g., Ariz. Rev. Stat. Ann. § 13-703(F)(6)(1978 & Supp. 1987); Cal. Penal Code § 190.2(a)(14)(West Supp. 1987); Del. Code Ann., tit. 11, § 4209(e)(1)(l)(Supp. 1987); Ga. Code Ann. § 17-10-30(b)(7)(1982); Ill. Ann. Stat. ch. 38, § 9-1(b)(7)(Smith-Hurd Supp. 1987); Idaho Code § 19-2515(f)(5)(1979 & Supp. 1987); Neb. Rev. Stat. § 29-2523(1)(d)(1979); Nev. Rev. Stat. § 200.033(8)(1985); Tenn. Code Ann. § 39-2-203(1)(5)1982); Utah Code Ann. § 76-5-202(1)(q)(Supp. 1987).

Petitioners Gary D. Maynard and the Attorney General of the State of Oklahoma.

PROPOSITION

THE SENTENCER'S DISCRETION WAS ADEQUATELY CHANNELLED WHERE THE STATE APPELLATE COURT SET GUIDELINES FOR A REVIEW OF THE SUFFICIENCY OF THE EVIDENCE OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE; SUBJECTIVITY IN SENTENCING IS NOT UNCONSTITUTIONAL.

The Petitioners contend that the Oklahoma Court of Criminal Appeals has not interpreted the "especially heinous, atrocious or cruel" aggravating circumstance in capital cases in an unconstitutionally overbroad or vague manner. Oklahoma allows the sentencer to consider the attitude of the killer, the manner of the killing or the suffering of the victim to support this circumstance.

Thus, guidelines are provided for a disjunctive interpretation of the terms "heinous", "atrocious", and "cruel", terms of which only the latter is descriptive of the victim's suffering (See definitions, J.A. 12).

The amici contend that the state should be left free to determine what particular guidelines control its own interpretation of that circumstance so long as it can be established that sufficient evidence sets apart a particular murder in which this circumstance is found to exist from other less outrageous murders. The circumstance is not per se violative of the United States Constitution. Gregg v. Georgia, 428 U.S. 153, 201 (1976); Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

The various states employing this particular circumstance have developed divergent interpretations of the circumstance, all of which constitutionally focus upon the depravity of mind of the killer or the suffering of the victim.[2] For example, in Woratzeck v. Ricketts, 820 F.2d 1450, 1458 (9th Cir. 1987) a panel of the United States Court of Appeals for the Ninth Circuit has acknowledged the Arizona Supreme Court's definitions of the terms within this circumstance:

> The Arizona Supreme Court has defined "cruel" as disposed to inflict pain in an especially

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[2] Some states interpret torturous conduct to include psychological torture. See e.g., Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1987)(Florida); Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir. 1987) (Mississippi). State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (N.C. 1983).

> wanton, insensate, sadistic, or vindictive manner; "heinous" as shockingly evil or grossly bad; and "depraved" as marked by corruption, perversion, or deterioration. See, State v. Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64, cert. denied, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983).

820 F.2d at 1458. That court upheld the state appellate court's determination of the existence of the circumstance, limiting its own review to a presumption of correctness by the state appellate court's finding unless not fairly supported by the record. Id. See, Sumner v. Mata, 449 U.S. 539, 549-50 (1981). The state court had specifically found that the defendant's violence reflected a heinous and depraved attitude.

Another panel of the Ninth Circuit shortly thereafter refused to accord such deference to the Arizona Supreme

Court interpretation of the circumstance. In Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987), the court held that the standard of heinousness and depravity could not be applied in a principled manner to the defendant in that case, and struck down the death sentence as arbitrary. Id. at 485. That panel reached that conclusion despite acknowledgement that the Arizona Supreme Court had set forth five factors that lead to a finding of heinousness or depravity; (1) a relishing of the murder by the killer; (2) gratuitous violence against the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim; and had found the circumstance to exist in that case.

Amici contend that deference by federal courts to state court interpretations is appropriate where, as in Oklahoma and Arizona, the state appellate courts have fashioned standards for review of the circumstance.

The purpose of providing aggravating circumstances is to give guidance to a sentencer when imposing the death sentence rather than to give federal courts supervisory review over whether state courts are appropriately evaluating and quantifying the death penalties imposed in their jurisdictions. Cf. Pulley v. Harris, 465 U.S. 37 (1984) (states are not required to conduct a proportionality review of the death sentences imposed).

The State's power upon appellate review to determine the sufficiency of evidence regarding the existence of a particular aggravating circumstance, see e.g., Okla. Stat. Ann. Tit. 21 § 701.13(C)(2) (West Supp. 1988), should not be limited by federal courts. In Patterson v. New York, 432 U.S. 197, 201 (1977), the Court noted:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Just as this Court has ruled that review of a criminal defendant's guilt is limited to consideration whether a rational factfinder could have found the defendant guilty beyond a

reasonable doubt, see Jackson v. Virginia, 443 U.S. 307, 324 (1979), amici submit that federal review of an aggravating circumstance is similarly limited. Cf. California v. Ramos, 463 U.S. 992, 1001 (1983) (deference given to State's choice of substantive factors relevant to penalty assessment).

In Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987) (on rehearing en banc) and Jeffers v. Ricketts, 832 F.2d at 484-85, the federal courts have sought to excise any subjectivity from the factfinder's discretion by mandating that completely objective factors be employed in determining the existence of an aggravating circumstance.

Amici contend that elimination of all subjectivity is not constitutionally required to validate a death sentence. Subjectivity is inherent in a factfinder's decision-making. See Jackson v. Virginia, 443 U.S. at 331 n.2. This Court has virtually mandated subjectivity in the context of a capital sentencing determination by its ruling regarding consideration of evidence in mitigation in Skipper v. South Carolina, 476 U.S. 1, 4 (1987).

Amici contend that continued reliance upon an interpretation of Godfrey v. Georgia, 446 U.S. 420 (1980), that the especially heinous, atrocious or cruel aggravating circumstance is proper only upon an objective showing of torture or

physical abuse improperly restricts the factfinder and state appellate courts from consideration of all the relevant evidence in aggravation. Limitation of this circumstance to pre-mortem suffering by the actual murder victims could result in an unjust sentence. For example, should a depraved killer place a bomb on a school bus to cause emotional trauma to the loved ones of the children on board, and that bomb kill instantly all those on the bus, Godfrey would mandate rejection of a finding that the murders were especially heinous, atrocious or cruel.

In Petitioner's case, it cannot be said that the killer's depraved attitude was not evidenced by sufficient evidence as determined by the Oklahoma Court of Criminal Appeals - he

expressed his desire for revenge for having been laid off from employment by the murder and shooting victims, Mr. and Mrs. Riddle; he lay in wait for them or returned to the home under cover of darkness; he viciously attempted to kill Charma Riddle as well as successfully killed Hugh Riddle; and he engaged in efforts to conceal his deeds. Cartwright v. State, 695 P.2d 548, 554-55 (Okla. Crim. App. 1985).

Amici contend it is untenable to conclude that Hugh Riddle's murder should not be set apart from other murders simply because the evidence does not support a conclusion that Hugh Riddle lingered in pain before he died. Evidence of respondent's depraved mind was present throughout the entire criminal episode. It indeed seems more

arbitrary to require objective evidence of physical pain before allowing the existence of this circumstance than to allow subjectivity to play a role in evaluating the circumstance.

The appellate courts of Oklahoma and Arizona have rejected a finding of the circumstance in appropriate instances under evidence particular to the cases being reviewed. See, Odum v. State, 651 P.2d 703, 707 (Okla. Crim. App. 1982); State v. Graham, 135 Ariz. 209, 660 P.2d 460, 463 (1983).

Because concepts of federalism and subjectivity in sentencing are applicable to trials for capital offenses, this Court should rule that the Tenth Circuit Court of Appeals exceeded the bounds of its review of Respondent's sentence and that the

interpretation of the especially heinous, atrocious or cruel circumstance by the Oklahoma Court of Criminal Appeals was adequately channelled, particularly when another statutory aggravating circumstance was found.

CONCLUSION

For the reasons stated, the amici respectfully request that the decision of the United States Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

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